Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
PETITION FOR DECLARATORY RELIEF	)	
IN THE FORM OF CLARIFICATION OF	)	
SECTION 317 OF THE COMMUNICATIONS	)	RM No. 7984
ACT OF 1934 REGARDING SPONSORSHIP	)	
IDENTIFICATION ANNOUNCEMENTS FOR	)	
INFOMERCIALS	)	

To: The Commission

Reply of

Center for the Study of Commercialism, Center For Media Education, Telecommunications Research and Action Center, Petitioners,

To the Comments of the National Infomercial Marketing Association, the Opposition of the National Association of Broadcasters, and the Opposition of the Association of Independent Television Stations.

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June 25, 1992

The Commission has received responses from three parties -- the National Association of Broadcasters (NAB), the National Infomercial Marketing Association (NIMA), and the Association of Independent Television Stations (INTV) -- to its Public Notice regarding petitioners' request for a declaratory ruling or rulemaking regarding sponsorship identification of infomercials. NAB and NIMA did not comply with the Commission's rules regarding service; thus, the Commission should not consider their comments.

Even if the Commission considers all of the comments, none demonstrates sufficient reasons to deny the petition. To the extent that the responses raise factual questions regarding the scope and nature of the sponsorship identification problem, petitioners submit that these questions should be resolved through further proceedings, such as a rulemaking.

I. The Commission Should Not Consider The NIMA Or NAB Filings Because Both Parties Failed To Timely Serve The Petitioners.

As an initial matter, the Commission should decline to consider the Comments of NIMA and the Opposition of NAB because neither party has complied with the Commission's rules regarding service, 47 C.F.R. § 1.405. The Commission requires parties supporting or opposing petitions for rulemaking to prove service of their statements "upon the petitioner on or prior to the date of filing." Id.

While NAB filed its Opposition with the Commission on June 10, 1992, the petitioners were not served with that Opposition and only obtained it on June 17, 1992. Petitioners' counsel learned of NAB's filing only through the trade press, and were

forced to seek out and acquire the Opposition themselves.

Similarly, the petitioners only learned of the NIMA filing on June 17, 1992 when contacted by counsel for NIMA. Counsel for NIMA mailed the Comments to petitioners' counsel on that date, and the Comments were only received on June 19, 1992.

The Commission's rules are plain and mandatory. Both NAB and NIMA have declined to abide by the Commission's rules in this proceeding, and petitioners submit that the appropriate response is for the Commission to reject their filings. See Frequency Coordination in the Industrial Radio Service, 16 FCC 2d 299, 299 n.1 (1969) (declining to consider comments on a petition for rulemaking which were not served on the petitioner).[1]

II. No Party Has Advanced Reasons Sufficient To Counter The Need For Commission Action.

Assuming the Commission considers the NAB and NIMA filings, neither these nor the INTV filing demonstrate that a rulemaking is unwarranted. The commenters raise essentially four objections to the petition. First, they contend that the Federal Trade Commission (FTC) is adequately addressing any problems of inadequate sponsor identification. Second, they argue that industry self-regulation is sufficient to prevent any problems. Third, they raise the spectre of declining revenue for broadcasters if the petition is granted. Finally, they claim that any additional regulation related to sponsor identification

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[1] If the Commission does consider these filings, it should reprimand these parties for their actions. The NAB, in particular, should be fully aware of its obligations under the rules, and its disdain for the public should not be countenanced.

would violate the First Amendment. As explained below, these objections are insufficient grounds for refusing to issue a declaratory ruling or initiate a rulemaking proceeding.

A. FTC Enforcement Does Not Address The Issues Posed In The Petition.

Each opposing commenter points to FTC enforcement actions as sufficient to counter inadequate sponsor identification in infomercials. NAB at 4-6; NIMA at 10-11; INTV at 3-4. The thrust of this position is that the FCC need not involve itself in an arena where another federal agency has acted. This position misapprehends the nature of the issue presented to the Commission, and fails to recognize that FTC enforcement is no substitute for FCC action.

As NIMA points out, the purpose of Section 317 is to ensure that viewers are informed of the sponsored nature of programming, including infomercials. NIMA at 4. The purpose of Section 317 is not to battle fraudulent product claims, and the petition does not request that the FCC move into that arena. Rather, the petition asks the Commission to fulfill its own statutory mandate in this emerging field, to require full and fair disclosure of sponsorship. Pet. at 16-19. Infomercials are a unique advertising format, which did not exist when the Commission issued its current identification requirements for advertising. The emergence of this new form of advertising demands a new look at sponsorship identification practices. Pet. at 6-9, 20-21.

NAB and NIMA agree with the petitioners that FTC enforcement actions are handled on an individual basis, with an emphasis on

deceptive product claims. Pet. at 13-15; NAB at 4; NIMA at 11. Indeed, the statement by FTC Commissioner Owen bears this out: the Commission has initiated only eleven actions against infomercial producers, and only one of those actions has been aimed solely at deceptive format.[2] The FTC has confined itself largely to actions against fraudulent claims, rather than inadequate sponsor identification under Section 317 of the Communications Act. Further, FTC action tends to have no mandatory effect on infomercials which are aired, because FTC enforcement actions generally result in the discontinuation of particular infomercials rather than modification of their format. Pet. at 14-15 and n.38.

Individual enforcement actions by the FTC are inefficient and take place long after the damage is done. In contrast, the petition seeks a prophylactic rule. Unlike the FTC, the FCC has rulemaking authority enabling it to enforce Section 317 of the Communications Act, and it appropriate for the Commission to issue such rules in this context.

B. Industry "Self-Regulation" Is Inadequate.

NIMA and NAB contend that industry self-regulation, in the form of NIMA's guidelines, is more than sufficient to guarantee adequate sponsorship identification. NIMA at 9-10; NAB at 6-7. Such assurances are insufficient.

First, a large proportion of infomercial producers (25%)

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[2] Remarks of Deborah K. Owen, Commissioner, Federal Trade Commission, before the National Infomercial Marketing Association Seminar, June 5, 1992, at 6.

have not been "certified" by NIMA (NAB at 1 n.3), and a significant proportion of infomercials currently aired (20%) are produced by non-NIMA members (NIMA at 1). When such substantial percentages of all infomercials are not even covered by the NIMA guidelines, simple recitation of those guidelines cannot rebut the need for further action.

More importantly, the NIMA guidelines are simply insufficient. First, these guidelines only require sporadic announcements which may be missed by viewers. Petition at 4-5. Second, the guidelines permit these announcements to be either spoken or written (NIMA at 9), and thus likely to be missed by viewers who are temporarily distracted or who are hearing-impaired. As demonstrated in the petition, the unique nature of the infomercial format (its length, type of presentation, and the availability of direct-order merchandising) raises substantial questions regarding the adequacy of existing sponsorship identification. Pet. at 2-6. Even universal compliance with the NIMA guidelines would fall short of the need for "full and fair" disclosure in this unique format.

C. The Revenue-Generating Capacity Of Infomercials Is Irrelevant To Commission Consideration Of The Petition.

NIMA opposes a continuous-disclosure requirement on the ground that such a requirement would place infomercials at a competitive disadvantage with other forms of advertising, thus diminishing their value and viability, and ultimately undermining the commercial viability of on-air television. NIMA at 12-13;

see also INTV at 2. This proposition is absurd on its face.

The petition asks the Commission to impose a simple disclosure requirement upon infomercial broadcasts. The only way such a requirement can reduce this (supposedly) all-important revenue stream is if consumers who receive a disclosure make use of the additional information by deciding not to purchase the advertised products. If that happens, it is because consumers are inadequately informed or misled by the absence of disclosure under the current regime. Simply put, NIMA argues that the Commission should put the licensee's commercial interest ahead of the public's right not to be misled. The point of the Communications Act, however, is that viable licensees should serve the public interest, not to have the public suffer so that licensees can make money. If broadcasters can survive only by cheating the public, they do not deserve to be licensees.

NIMA further argues that "branding" infomercials with a continuous identification requirement would unfairly singly out the infomercial from other commercials and "damage its viability in the marketplace." NIMA at 12-13. This contention fails to recognize that, unlike thirty-second commercials, infomercials have a full half-hour to make their case. This advantage over other forms of commercial is a distinct difference justifying a rule designed to address the practices identified in the petition.[3]

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[3] A related argument posed by both NIMA and NAB is that a continuous-disclosure argument would "restrict the creative (continued...)

D. The Proposed Interpretation Of Section 317 Does Not Implicate The First Amendment.

The commenters' First Amendment arguments similarly lack merit. Both NAB and NIMA contend that the proposed rule would impermissibly infringe upon commercial speech, in violation of the First Amendment. NAB at 10; NIMA at 13-16. No such violation would occur.

While infomercials are protected under the First Amendment as commercial speech, a continuous sponsorship-identification rule simply would not raise a First Amendment issue. Continuous sponsorship identification for infomercials is wholly consistent with the First Amendment purpose of "insuring that the flow of truthful and legitimate commercial information is unimpaired." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1975). First Amendment concerns are not implicated when the government requires a speaker "to make additional disclosures that would better enable the public to evaluate the import of the [speech]." Meese v. Keene, 481 U.S. 465, 480 (1987) (upholding statute designating certain films as "political propaganda" and requiring specific labelling of the

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[3](...continued)
freedom" of infomercial creators. NIMA at 13; NAB at 10. There is no support for this position. The petition does not request any restrictions on the format or presentation of infomercials, other than the presence of a simple, unobtrusive, on-screen identification. This requirement could be satisfied with a small logo in one corner of the screen, among other options. Pet. at 19. None of the forms suggested by the petitioners could seriously be thought to inhibit the "creative freedom" of an advertiser, and neither NAB nor NIMA suggest how this "problem" could materialize.

film). See also Virginia State Bd. of Pharmacy, 425 U.S. at 772 n.24 (it is "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive."). Thus, a continuous sponsorship identification rule which mandates the disclosure of factual information would not infringe upon any First Amendment right.[4]

NIMA refers the Commission to Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980), to support its constitutional argument. This reliance ignores the fact that Central Hudson involved an outright prohibition on commercial speech, a situation radically different than the proposed regulation at issue here. Nonetheless, even if the Central Hudson test were applicable, the proposed regulation falls squarely within the ambit of acceptable government action.

Regulation of truthful commercial speech must satisfy three criteria: the government must have a strong interest in restricting the speech, the regulation must directly advance that interest, and the restrictions may be no more extensive than is necessary to advance that interest. Posadas De Puerto Rico Ass'n v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341-43 (1986). The proposed sponsorship identification rule would meet all three requirements: the government has a clear interest in insuring

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[4] Ironically, while NIMA notes that infomercials "serve the public interest by providing valuable information to consumers," (NIMA at 2), it balks at a proposal aimed at guaranteeing important and necessary information for consumers.

that the viewing public is fully aware of the commercial nature of infomercials, as evidenced by Section 317 of the Communications Act; the rule would advance this interest by requiring continuous notice of sponsorship, thus ensuring that all viewers are aware of its commercial nature; and the rule would be narrowly tailored -- providing enough information to inform the consumer without restricting the current format of the infomercial.

The Posadas decision is particularly relevant here. In Posadas, the Court observed that government is free to limit commercial speech when the underlying conduct itself may be banned. 478 U.S. at 345-346. In Posadas, the underlying conduct was casino gambling. Here, the underlying conduct is the broadcast of infomercials -- conduct which the Commission has previously forbidden outright,[5] and which the Congress has recently forbidden (following extensive consideration of the constitutional implications) in the context of children's television. See Children's TV Programming, 6 FCC Rcd 2111, 2123 n.5 (1991). Unlike these prohibitions, the proposed sponsorship identification rule is much less restrictive, requiring only disclosure of the commercial nature of the broadcast. If the Commission were to adopt the sponsorship identification rule, it would not be overstepping its regulatory authority.

In conclusion, the commenters' argument that the proposed

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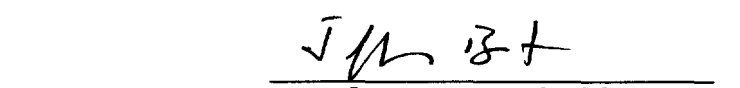
[5] See Applicability of Commission Policies on Program-Length Commercials, 44 FCC 2d 985, 989 (1974).

rule violates the First Amendment is simply a chimera. The rule in no way prohibits or restrains the broadcast of infomercials and actually helps to fulfill the First Amendment goal of disseminating accurate information to consumers.

III. The Comments In Opposition Demonstrate The Need For A Rulemaking In This Matter.

If the comments from INTV, NAB, and NIMA prove anything, it is that a rulemaking is appropriate in this matter. Each set of comments asserts that the petition failed to provide sufficient factual allegations of widespread deception. INTV at 3; NAB at 9; NIMA at 7. Yet the petition does demonstrate specific factual and legal reasons why current sponsorship identification practices for infomercials are inadequate to the demands of Section 317 of the Communications Act. Pet. at 2-6, 16-18. At this early stage of the process, this dispute counsels in favor of a rulemaking proceeding (or, at minimum, a Notice of Inquiry) which can lead to full development of all facts from many parties. Should the Commission agree that the evidence presented is insufficient, the proper response is to develop further evidence -- not to end the inquiry. A rulemaking proceeding is the appropriate vehicle for this inquiry.

Respectfully submitted,



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June 25, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 1992, I caused to be mailed copies of the foregoing Reply of Petitioners to the following parties in this proceeding:

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